

DrinkerBiddle&Reath

John P. Bankson, Jr.  
Of Counsel  
202-842-8806  
banksojp@dbr.com

August 2, 1999

DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 2 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND**

Secretary  
Federal Communications Commission  
Room TW-A325  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

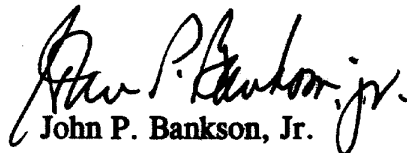
Re: (MM Docket No. 99-25)  
Low Power FM Rulemaking  
Comments of Ingleside Radio, Inc.

Dear Ms Salas:

We are filing the original and four (4) copies of the Comments of Ingleside Radio, Inc., in the above captioned matter.

Please stamp the enclosed copy of this filing as received and return it to our courier.

Very truly yours,

  
John P. Bankson, Jr.

Enclosures

JPB/jb

No. of Copies rec'd 014  
List ABCDE

DC1265788/1

Law Offices 1500 K Street N.W. Suite 1100 Washington, DC 20005-1209 202-842-8800 Fax: 202-842-8465

Philadelphia Washington Princeton Berwyn www.dbr.com

150<sup>th</sup>  
ANNIVERSARY  
1849-1999

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )

Creation of a Low )  
Power Radio Service )

TO THE COMMISSION )

MM Docket No. 99-25  
RM-9208  
RM-9242

**RECEIVED**  
**AUG 2 1999**  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COMMENTS OF INGLESIDE RADIO, INC.**

Ingleside Radio Inc., licensee of WWCD(FM), Grove City, OH, by its attorneys and pursuant to 47 C.F.R. § 1.415, files its comments in the captioned rulemaking proposing a new low power FM (LPFM) radio service.

1. WWCD is in the Columbus, OH, radio market. It is a Class A stand alone station with a 2.5 share.<sup>1</sup> It competes, not only with the traditional AM - FM combinations but also with five stations licensed to Clear Channel Communications, Inc., with an aggregate 28.6 share and three stations licensed to CBS Radio, Inc., with an aggregate 11.5 share. WWCD accepts its competitive battle with these major multiple owners and other existing radio stations, but it urges the Commission not to establish another FM radio service for which a case has not been made and which would be contrary to the public interest.

2. A fundamental truism of history is: when mistakes are forgotten or ignored, they will be repeated. Much prior experience with radio rule changes and licensing requires rejection of an LPFM service. The notion that more is better is plainly wrong. The AM broadcast band

---

<sup>1</sup> Billboard Magazine, May 22, 1999, p. 91; Arbitron 12+ average quarter hour shares, Winter, 1999.

long ago fell victim to overcrowding caused in large part by licensing on demand; would be broadcasters proposed marginal facilities with low power and/or exotic directional antennas. Receiving interference was institutionalized in the Ten Percent Rule, permitting AM stations and applicants to receive that much. Recognizing the outcome of AM overcrowding, the Commission initially promulgated a Table of Allotments for commercial FM stations, 47 C.F.R. §73.202. Later, FM was shifted to a demand system; however, the Commission soon saw the error of its ways and reinstituted the FM Table in 1964. The many allotments adopted in BC Docket 80-90 increased the number of FM stations within the framework of established mileage separations and power limitations. A new FM service was not added. The Commission recognizes the inefficiency of low power FM operation; in 1978, the Commission decided that effective radiated power of FM stations below 100 watts is an inefficient spectrum use under 47 U.S.C. § 307(b).<sup>2</sup> Nothing has occurred since to change that reality, see 47 C.F.R. §§ 73.211(a)(1)(i) and 73.511(a).

3. Creation of a new LPFM service would be a radical departure from these prior Commission rulings. It is vital to remember that, once the genie is out of the bottle, there is no way to put it back. Intense care is required, particularly with regard to digital in-band, on-channel (IBOC) technology.<sup>3</sup> The future of digital FM must be resolved before consideration of any LPFM service because the latter could foreclose full consideration of conversion from

---

<sup>2</sup> Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 FCC 2d 240, 248-250 (1978).

<sup>3</sup> See USA Digital Radio Partners, L.P., Petition for Rulemaking, filed October 7, 1998.

analog to digital radio. The Commission in 1993 assumed an obligation to IBOC and existing FM broadcasters:

“We continue to support efforts to implement terrestrial in-band (Digital Audio Radio Service) technology. We believe that existing radio broadcasters can and should have an opportunity to take advantage of new digital radio technologies.”<sup>4</sup>

While the Commission has broad rule making authority, it may not repeal the laws of physics.

4. One claimed justification is that LPFM radio responds to the problem of pirate radio. How the creation of a new FM service will solve that problem is unknown and unknowable. How LPFM stations, if allowed, will end up in the hands of minorities and women, a laudable objective, is not explained, nor can it be. The Commission is obliged to conduct auctions for all mutually exclusive applications by the Balanced Budget Act of 1997, and LPFM authorizations will go to the persons and entities willing to pay the most, not politically correct persons and entities of choice. The aftermath of BC Docket 80-90 demonstrates how such objectives are not realized because of economic realities. In comparative hearings prior to the Bechtel<sup>5</sup> case, many minorities received construction permits and sold out as soon as they could. The marketplace controls. In addition, the Commission is subject to the Lutheran Church<sup>6</sup> case which places strong limitations on the Commission’s discretion to favor minorities.

---

<sup>4</sup> Amendment of the Commission’s Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, 7 FCC Rcd 7776, 7778 (1993).

<sup>5</sup> Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).

<sup>6</sup> Lutheran Church - Missouri Synod v. FCC, 154 F.3d 487 (D.C. Cir. 1998), see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

5. The notion that the adoption of an LPFM radio service will achieve social goals is fanciful. What can be expected is a flood of applicants and regulatory chaos, both because the Commission may not regulate programming and because of limited budget and staff in the Field Operations Bureau. LPFM applicants of the future will have at least some of the characteristics of pirate radio operators, and it is naive to think that they will become compliant with Commission rules and requirements. Other lessons of history relevant to this concern are television translators and Rural Service Area cellular telephone applications which caused administrative nightmares with thousands of applications. This is not to say that the Commission cannot do its work, but it is a caution that there must be a clear understanding of what lies ahead before rules are amended. Expected multiple assaults on the Commission's processes are an appropriate basis for denial of relief.<sup>7</sup>

6. Rather than idealistic operations, an expectation for LPFM proponents is personified by Jerry Szoka, a nightclub operator in Cleveland, OH, who continued to broadcast unlawfully after warnings by the Commission and a show cause proceeding. In defense, he raised the First Amendment, inefficient use by the Commission of the radio spectrum and arguments based on the Fifth, Sixth, Seventh and Eighth Amendments with regard to his proposed forfeiture.<sup>8</sup> Similarly instructive of a type of applicant to be expected is the marathon litigation involving a defiant private operator<sup>9</sup> and his Radio Free Berkeley who stonewalled the

---

<sup>7</sup> Turro v. FCC, 859 F.2d 1498 (D.C. Cir. 1988).

<sup>8</sup> Jerry Szoka, FCC 99-145, released June 15, 1999. CIB Docket No. 98-48.

<sup>9</sup> Stephen Paul Dunifer, 11 FCC Rcd. 718 (1995); US v. Dunifer, 997 F.2d 1235, 1240 (N.D. Cal., 1998) appeal pending No. 99-15035 (9<sup>th</sup> Cir. 1999).

Commission for several years and widely promoted an ability to put anyone unlawfully on the air with a pirate FM station for \$55.00.

7. There is now no public interest reason to: (1) disrupt current FM broadcasting; (2) foreclose full and measured consideration of conversion to terrestrial digital audio broadcasting; and (3) create administrative chaos, both in initial licensing and subsequent oversight, in order to add an LPFM service. There is even less reason to do so because a viable alternative exists for specialized community broadcast services, the Internet, which has limitless potential to fulfil the stated objectives of the proponents of LPFM radio service without impact on the present FM allotment and licensing system.

Respectfully submitted,

INGLESIDE RADIO, INC. (WWCD(FM))

By:

  
John P. Bankson, Jr.

Its Attorney

Drinker Biddle & Reath LLP  
Suite 1100  
1500 K Street, N.W.  
Washington, D.C. 20005  
(202) 842-8800

August 2, 1999

Certificate of Service

I, Josefina Barberena, hereby certify that on August 2, 1999, a copy of the foregoing Comments of Ingleside Radio, Inc., was served by hand on the following:

Ms. Judy Boley  
Federal Communications Commission  
The Portals  
Room C-1804  
445 - 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Mr. Timothy Fain  
OMB Desk Officer  
10236 NEOB  
725 - 17<sup>th</sup> Street, N.W.  
Washington, DC 20503

  
Josefina Barberena